IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 27, 2006

JOHNNY PHELPS v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Hamilton County
No. 248965 Douglas A. Meyer, Judge

No. E2005-02405-CCA-R3-PC - Filed August 11, 2006

In 1973, a Hamilton County jury convicted the Petitioner of rape, and the trial court imposed an effective sentence of ninety-nine years in prison. On direct appeal, this Court affirmed the Petitioner's convictions, and the Tennessee Supreme Court denied the Petitioner's application for permission to appeal. In 2004, the Petitioner filed a petition for post-conviction relief requesting DNA[1] testing pursuant to the Post-Conviction DNA Analysis Act of 2001. After the State responded that it was unable to find any biological evidence relating to the crime, the trial court denied the Petitioner's post-conviction petition. The Petitioner appeals, contending that the trial court erred by dismissing the petition without an evidentiary hearing. Finding that there exists no reversible error, we affirm the trial court's dismissal of the petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JAMES CURWOOD WITT, JR., JJ., joined.

Johnny L. Phelps, pro se, Mountain City, Tennessee.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General, for the appellee; William H Cox, III, District Attorney General; Rodney C. Strong, Assistant District Attorney General, State of Tennessee.

OPINION
I. Facts

On July 5, 1973, a Hamilton County jury convicted the Petitioner of rape. This Court summarized the underlying facts of the Petitioner's case on direct appeal as follows:

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[1] Deoxyribonucleic acid

> The victim was accosted during daylight as she returned to her automobile after attending a physics class. Two black men kidnapped her at pistol point, drove her to the apartment of a third black [co-defendant], and all three had sexual intercourse with her. Upon her release she sounded the alarm and guided authorities back to the apartment. [The co-defendant] was there, it being where he lived, and after a brief denial of personal participation, he gave multiple confessions and named [the Petitioner] as the initial violator of the girl . . . .
>
> The victim positively identified [the Petitioner] as the gunman, and as the one who raped her first and last. [The Petitioner] testified that he was not involved, that he was elsewhere.
>
> The evidence overwhelmingly supports the finding of guilt as to both [the Petitioner and the co-defendant].

Stone v. State, 521 S.W.2d 597, 598 (Tenn. Crim. App. 1974).

On April 5, 2004, the Petitioner filed a petition for DNA testing under the Post-Conviction DNA Analysis Act of 2001. On April 23, 2004, the trial court ordered the State to respond to the petition within 30 days. On July 19, 2004, the Petitioner filed a second petition for DNA testing, which the trial court treated as an amended petition. In his petition, the Petitioner raised multiple claims, only two of which relate to evidence from the original trial.[2] Specifically, regarding evidence, the Petitioner asserts that the trial court erred by denying his request that he be allowed to submit to a blood test for the purpose of biological testing and that the police, after his arrest, violated his rights by not taking him to the hospital for a blood test. On September 14, 2004, the trial court entered an order that again ordered the State to respond to the petition within 30 days. On August 2, 2005, the State filed a response to the Petitioner's request for DNA analysis stating that, in its investigation, it was unable to locate any biological evidence from the trial. In the response, the State outlined the steps of its investigation as follows: First, after contacting the Chattanooga Police Department to provide a copy of the original police file, the State determined that the file no longer exists. Second, after requesting a copy of the trial transcript from the Court of Criminal Appeals, the State discovered that the trial record was on a videotape, and the videotape system used in 1973 is no longer in existence. Thus, the State determined that the trial transcript is in an unretrievable format. Third, in a discussion of the case with Judge Steve Bevil, a former Assistant District Attorney who prosecuted the case in 1973, the State discovered that Judge Bevil did not recall any physical evidence used at the trial. And fourth, in a conversation with Mike Martin of the

[2]The Petitioner requested post-conviction relief because he was: placed in an illegal lineup; denied access to an attorney after arrest; denied a request to submit to a blood-test; and denied Due Process. Additionally, the Petitioner claimed that he received the ineffective assistance of counsel and was improperly sentenced. Although not specifically addressed by the trial court, we note that even if some or all of these claims are appropriate for consideration in a petition for post-conviction relief, the claims would clearly be barred by the applicable statute of limitations for post-conviction petitions. Further, the Petitioner asserts in his petition in this case that he previously filed a petition for "Regular Post-Conviction Relief," presumably including these claims, and relief was denied.

Tennessee Bureau of Investigation ("TBI"), the State discovered that the TBI did not begin serology testing until July of 1974, one year after the Petitioner's trial. Thus, the State discovered that it was unlikely that the TBI would have received the case in 1973. The lower court, relying on the pleadings and taking judicial notice of there being no mention of biological evidence in the opinion affirming the conviction of the Petitioner, summarily dismissed the petition. The Petitioner now appeals that decision.

II. Analysis

On appeal, the Petitioner contends that the trial court erred when it dismissed his petition for post-conviction relief without an evidentiary hearing. The Post-Conviction DNA Analysis Act of 2001 provides:

> [A] person convicted of and sentenced for the commission of first degree murder, second degree murder, aggravated rape, rape, aggravated sexual battery or rape of a child, the attempted commission of any of these offenses, any lesser included offense of these offenses, or, at the direction of the trial judge, any other offense, may at any time, file a petition requesting the forensic DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence.

Tenn. Code Ann. § 40-30-303 (2003). Under the Post-Conviction DNA Analysis Act, the trial court, after affording the prosecution the opportunity to respond, *must* order a DNA analysis if it finds the following:

> (1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
>
> (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
>
> (3) The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
>
> (4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Tenn. Code Ann. § 40-30-304 (2003). Under the Post-Conviction DNA Analysis Act, the trial court, after affording the prosecution the opportunity to respond, *may* order a DNA analysis if it finds the

following:

> (1) A reasonable probability exists that analysis of the evidence will produce DNA results which would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction;
>
> (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
>
> (3) The evidence was never previously subjected to DNA analysis, or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
>
> (4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Tenn. Code Ann. § 40-30-305 (2003).

The scope of our review is limited, as the post-conviction court is given considerable discretion in deciding whether the Petitioner is entitled to relief under the Post-Conviction DNA Analysis Act. See Jack Jay Shuttle v. State, No. E2003-00131-CCA-R3-PC, 2004 WL 199826, at *4 (Tenn. Crim. App., at Knoxville, Feb. 3, 2004), *perm. app. denied* (Tenn. Oct. 4, 2004). Therefore, this Court will not reverse the post-conviction court unless its judgment is not supported by substantial evidence. Willie Tom Ensley v. State, No. M2002-01609-CCA-R3-PC, 2003 WL 1868647, at *4 (Tenn. Crim. App., at Nashville, Apr. 11, 2003), *no perm. app. filed*; see State v. Hollingsworth, 647 S.W.2d 937, 938 (Tenn. 1983)

Rape is among the crimes for which a petitioner may request, at any time, DNA analysis of any evidence in possession of the prosecution or laboratory. Tenn. Code Ann. § 40-30-303. Further, the trial court must order DNA analysis of such evidence only if a petitioner satisfies all of the statutory requirements. Tenn. Code Ann. § 40-30-304. "The absence of any one of the four statutory conditions results in the dismissal of the petition." Sedley Alley v. State, No. W2004-01204-CCA-R3-PD, 2004 WL 1196095, at *2 (Tenn. Crim. App., at Jackson, May 26, 2004), *perm. app. denied* (Tenn. Oct. 4, 2004); see also William D. Buford v. State, No. M2002-02180-CCA-R3-PC, 2003 WL 1937110, at *6 (Tenn. Crim. App., at Nashville, Apr. 24, 2003), *no perm. app. filed*.

This Court has previously addressed instances in which the State contends that no testable DNA evidence exists. In Buford, this Court held that the trial court was correct in summarily dismissing a post-conviction claim due to an absence of testable evidence, stating:

> [T]he trial court implicitly concluded that evidence upon which DNA analysis could

> be conducted was no longer available. The failure to meet any of the qualifying criteria is, of course, fatal to the action. The affidavit filed by the state addressed the records of the law enforcement agencies, the prosecution, and the trial court clerk . . . . The records of this court do not include any specimen that could be subjected to DNA analysis. See State ex rel. Williamson v. Bomar, 213 Tenn. 449, 376 S.W.2d 451, 453 (1964) (this court may take judicial notice of its own records).
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> . . . .
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> Because the trial court here made a conscientious effort to determine the existence of the statutory conditions and had substantial facts upon which to determine that the biological specimens were no longer available, a summary dismissal was appropriate.

Buford, 2003 WL 1937110, at *6.

In the case under submission, we conclude that the trial court did not err by summarily dismissing the Petitioner's request for DNA analysis. The trial court made a conscientious effort to determine the existence of the statutory conditions and possessed substantial facts upon which it determined that no biological specimens were available. In reaching its decision, the trial court relied on both the State's response to the Petitioner's pleading and the Petitioner's pleading itself. The State's response in this case asserted that no testable physical evidence exists, and, like the State's affidavit in Buford, the State's response in this case addressed the records of law enforcement agencies, both the Chattanooga Police Department and the TBI. Additionally, like the State's affidavit in Buford, the State's response in this case, through its conversation with the former Assistant District Attorney who prosecuted the case, Judge Bevil, addressed the records of the prosecution. Further, we note that the opinion of this Court in the direct appeal makes no mention of the use of biological evidence in its summarization of the facts sufficient to support the Petitioner's conviction. Because we are permitted to take judicial notice of the records of this Court, we have reviewed the archived appellate record of the Petitioner's direct appeal and discovered that no physical evidence is included. The trial court also implicitly relied on the Petitioner's failure to raise a cognizable claim under the Post-Conviction DNA Analysis Act of 2001. The only claims the Petitioner raises that relate to biological evidence indicate that no biological evidence was ever taken. Specifically, the Petitioner claims that the original trial court erred in denying his request for a blood test and that the police violated his rights by denying his request to be taken to the hospital for a blood test after his arrest.

This court previously stated, "[the Act] does not permit [the Petitioner] to appeal unrelated claims or reargue the issues raised in his previous, unsuccessful petition for post-conviction relief." Ricky Flamingo Brown, Sr. v. State, No. M2002-02427-CCA-R3-PC, 2003 WL 21362197, at *2 (Tenn. Crim. App., at Nashville, June 13, 2003), *perm. to app. denied* (Tenn. Oct. 6, 2003). Additionally, the Post-Conviction DNA Analysis Act of 2001 does not allow the Petitioner to bring time-barred claims that would have been properly addressed in other proceedings. Therefore, the

Petitioner is not entitled to relief on this issue.

III. Conclusion

In accordance with the forgoing authorities and reasoning, we affirm the post-conviction court's judgment.

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ROBERT W. WEDEMEYER, JUDGE